Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

YEAGLE DRYWALL COMPANY, INC.,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joseph H. O'Donnell, Jr.
Counsel of Record
116 East Allen Street
Philadelphia, PA 19125
(215) 426-3245
Attorney for Petitioner

24 pp

QUESTIONS PRESENTED

1. Does the label "officer," adopted by an individual who is the 99 percent shareholder and president of an S corporation, require such individual to be treated as an employee of the S corporation, based on a narrow and exclusive reading of 26 U.S.C. Sec. 3121(d)(1)?

2. Is the "employment status" definition in Section 530(c)(2) of the Revenue Act of 1978 suspended by Treasury Regulation 31.3121(d)-1(b), a non-legislative published interpretation of the Internal Revenue Service?

3. Are the instructions as to the character of income passed through to a shareholder of an S corporation, as contained in 26 U.S.C. Sec. 1366(b), suspended by 26 U.S.C. Sec. 3121(d)(1) when an S corporation shareholder labels himself or herself as an "officer?"

4. Does a reasonable basis exist to not treat an individual as an employee of an S corporation, when no employer-employee relationship ever existed under the usual common law rules between an S corporation and its 99% shareholder and president who is the individual not treated as an employee?

5. Is a taxpayer's due process violated when the Section 530(e) of the Revenue Act of 1978 written notice of the provisions of that Act are never provided by the Internal Revenue Service to a taxpayer which has been subjected to an employment tax audit inquiry by the I.R.S. regarding one or more individuals who perform services for the taxpayer, such as an "officer" of an S corporation?

CORPORATE DISCLOSURE STATEMENT

The Petitioner: YEAGLE DRYWALL COMPANY, INC., a Pennsylvania corporation.

YEAGLE DRYWALL COMPANY, INC., the petitioner, is a nongovernmental corporate party to the proceedings and was a party to the proceedings as the "Petitioner" in the United States Tax Court and the "Appellant" in the United States Court of Appeals for the Third Circuit.

YEAGLE DRYWALL COMPANY, INC. does not now have nor has ever had any parent or subsidiary corporations, and it is not now nor ever has been the parent corporation of another corporation nor has it ever been a subsidiary corporation of another corporation.

No publicly held corporation nor any other corporation owns or ever has owned 10 percent or more of the stock of YEAGLE DRYWALL COMPANY, INC..

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IN THE
SUPREME COURT OF THE UNITED STATES

YEAGLE DRYWALL COMPANY, INC.,
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V.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

YEAGLE DRYWALL COMPANY, INC., Petitioner, by undersigned cousel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

This case involves petitioner's challenge of a "Notice of Determination Concerning Worker Classification Under Section 7436" (Notice of Determination) served by respondent upon petitioner on February 23, 2000.

Petitioner timely filed its petition in the United States Tax Court which assigned docket number 3908-00 to petitioner. Petitioner subsequently filed its appeal from the Tax Court decision entered October 16, 2001, based on the Tax Court's memorandum opinion, T.C. Memo. 2001-284, dated October 15, 2001, to the United States Court of Appeals for the Third Circuit and was assigned No. 02-1132 in the Third Circuit. The Third Circuit issued its opinion in petitioner's appeal on December 18, 2002; wherein the Third Circuit combined petitioner's case with another appellant, Veterinary Surgical

Consultants, P.C. (VSC), Third Circuit Appellant No. 02-1214, which also sought an appeal from the Tax Court also concerning the challenge of a Notice of Determination sent to VSC on November 17, 1998.

Petitioner and VSC then filed a joint petition for rehearing en banc with the Third Circuit; the said petition for rehearing en banc was subsequently denied by the Third Circuit on March 5, 2003. All opinions, decisions, judgments, and orders in the lower courts in this case have been reproduced in the Appendix which is being simultaneously filed with this petition.

A petition for a writ of certiorari to this Court for VSC is also being filed with this Court. The governing legislation in both this case and that of VSC involves the Internal Revenue Code (Title 26 of the United States Code) and relevant parts of Section 530 of the Revenue Act of 1978 which have also been reproduced, in pertinent part, in the Appendix.

A CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The date the judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered December 18, 2002 (App.: p. 11a).

The date of the order by the United States Court of Appeals for the Third Circuit denying petitioner's petition for rehearing en banc was March 5, 2003 (App.: pp. 21a & 22a) and the "formal mandate" of the Third Circuit in this case was dated March 13, 2003 (App.: p. 11a).

Jurisdiction is conferred on this Court under 28 U.S.C. Sec. 1254(1).

RELEVANT PROVISIONS INVOLVED IN THE CASE

I. Statutes:

A. 26 U.S.C. Sec. 1366 (App.: pp. 23a & 24a)
B. 26 U.S.C. Sec. 3121(d)(1) (App. p. 24a)
C. Section 530 of the Revenue Act of 1978 (App.: pp. 25a & 26a)

II. Non-legislative Internal Revenue Service Revenue Procedure and Treasury Regulation:

A. Revenue Procedure 85-18 (App.: p. 27a)
B. Treasury Regulation 31.3121(d)-1(b) (also known as "26 C.F.R. 3121(d)-1(b)) (App.: p. 5a)

STATEMENT OF THE CASE

Petitioner is a Pennsylvania corporation which incorporated on October 2, 1989. Petitioner timely elected and was approved for subchapter "S" corporation (S corp.) status by the Internal Revenue Service (IRS) beginning with 1989 and all subsequent years, including 1995, 1996, and 1997, subjecting petitioner to the pass-through rules of 26 U.S.C. Sec. 1366.

Since its incorporation, petitioner has been in the business of drywall construction which was the sole source of petitioner's income. All during 1995, 1996, and 1997, John G. Yeagle (Mr. Yeagle) owned 99 percent of petitioner's stock, and Terree O. Yeagle (Mrs. Yeagle) owned the remaining 1 percent. Since its incorporation, Mr. Yeagle has been petitioner's president and treasurer, and Mrs. Yeagle has been petitioner's vice president and secretary.

Petitioner and Mr. & Mrs. Yeagle, who file their Federal tax returns Forms 1040 as joint filers, filed their Federal tax returns Forms 1120S (of petitioner) and Forms 1040 (of Mr. & Mrs. Yeagle) in a manner consistent with the S corp. pass-through rules to its shareholders in

conformity with the provisions of 26 U.S.C. Sec. 1366; i.e., the character of the gross receipts of petitioner retained the same character of petitioner's net income distributed to Mr. & Mrs. Yeagle and reported by them on their personal Federal tax returns as nonpassive income from an S corp. for each year since petitioner's incorporation. The income received and recorded by petitioner was never received by petitioner as "wages" due to an employee from an employer. There was never any such employer-employee relationship between petitioner and any of petitioner's customers, even though the income received by petitioner was based on the work performed by Mr. Yeagle and his helpers who were all paid by petitioner as independent contractors. Mr. Yeagle reported 99 percent of petitioner's total net income each year, including the years 1995, 1996, and 1997, not because he helped create that income at the S corporation level, but because he was a shareholder of petitioner who was entitled to 99 percent of petitioner's net profit, and Mr. Yeagle was the only investor in the facilities used in connection with petitioner's business operations and in conjunction with all the services and work he performed in petitioner's bvsiness operations. Mr. Yeagle never reported to any other person in petitioner, nor was he ever controlled in any way by petitioner or any other person who could possibly supervise him in his work for petitioner. In other words, Mr. Yeagle had no "employer" in reference to his total and complete control of petitioner and all of petitioner's business operations for each and every year since petitioner's incorporation.

After being notified by IRS of an employment tax audit inquiry, Mr. Yeagle hired the services of a representative who appeared on petitioner's behalf, but neither petitioner, Mr. & Mrs. Yeagle, nor petitioner's representative at the

IRS's initiated employment tax audit of petitioner were ever informed about the provisions of Section 530 of the Revenue Act of 1978, infra, nor were ever given any written notice of the provisions of Section 530 of the Revenue Act of 1978 (Sect. 530) either prior to, at the commencement of or at any time after the audit inquiry by the IRS concerning the question of a proposed employment status of Mr. Yeagle. Neither the Yeagles nor petitioner's representative were ever aware of any of the provisions of Sect. 530 until after the Tax Court delivered its memorandum opinion and decision in this case.

After receiving IRS's Notice of Determination, petitioner then timely filed its petition with the United States Tax Court which was the Court of first instance and which had jurisdiction under 26 U.S.C. Sec. 7436(a), the Federal jurisdictional basis to hear this case in Tax Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. THERE ARE NUMEROUS CONFLICTING OPINIONS IN DIFFERENT UNITED STATES CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE METHOD USED IN DETERMINING WHETHER AN OFFICER OF A CORPORATION IS AN EMPLOYEE OF THE CORPORATION.

The following is a listing of the conflicts existing between different Circuit Courts, including conflicting opinions within the same Circuit Courts in different cases, concerning the method used in determining whether an officer of a corporation is required to be an employee in an employer-employee relationship under the usual common law rules:

CONFLICT 1: THE THIRD CIRCUIT IN THE PRESENT CASE IS IN CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN Rosenberg v. XM Ventures, 274 F.3d 137,141 (3d Cir. 2001):

The Third Circuit admitted in its own opinion in this case that "by rejecting the taxpayers' [petitioner and VSC] argument, we are avoiding an interpretation of Sec. 3121(d) which would render subparagraph (1) [Sec. 3121(d)(1)] superfluous. See **Rosenberg v. XM Ventures...**" (See App.: p. 7a).

CONFLICT 2: THE THIRD CIRCUIT IN THE PRESENT CASE IS IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN Durando v. United States, 70 F.3d 548,552 (9th Cir. 1995):

In 1995 the Ninth Circuit defined how and why an S corporation's income passes through to its shareholder in **Durando**. Even though **Durando** was not an employment tax case, it instructively stated that "[a]n S corporation's income passes through to its shareholders not because they helped to create that income, but because they

are shareholders. See I.R.C. Sect. 1366(a)." The **Durando** Court also stated that Mr. Durando spent "...a substantial amount of time providing business services to at least one of the S corporations..."

In the present case, the Third Circuit relied on **Spicer Accounting, Inc. v. United States**, 918 F.2d 90 (9th Cir. 1990), which suspended the application of the employer-employee relationship tests under the usual common law rules, merely because Mr. Spicer was an "officer" of his S corporation and also its sole shareholder, since no other person besides Mr. Spicer existed in Spicer Accounting, Inc. to qualify as an "employer" under the common law rules of the employer-employee relationship.

It would appear then that the 1995 opinion of the Ninth Circuit in **Durando** supersedes the Ninth Circuit **Spicer** opinion, since the **Spicer** opinion, which would make the Third Circuit's argument in this case, using the flawed interpretation in **Spicer**, a meritless argument, did not apply the employer-employee relationship test to determine whether or not Mr. Spicer was an employee, but concluded he was an employee, merely because he received money from Spicer accountiing, Inc., an S corporation, and, in addition, labeled himself "president" (an "officer") of the S corporation, Spicer Accounting, Inc..

CONFLICT 3: THE NINTH CIRCUIT OPINION IN SPICER, Supra, IS IN CONFLICT WITH THE NINTH CIRCUIT OPINION IN DURANDO, Supra:

For the reasons given in the above two paragraphs under "CONFLICT 2" of this section of the Petition, **Spicer**, supra, is in conflict with **Durando**, supra.

CONFLICT 4: THE NINTH CIRCUIT OPINION IN Spicer, supra, IS IN CONFLICT WITH THE NINTH CIRCUIT OPINION IN Idaho Ambucare Center, Inc. v. U.S., 57 F.3d 752,756 (9th Cir. 1990):

Idaho Ambucare stated:

> "We are not convinced that **Spicer** forecloses the application of a dual capacity analysis. Having concluded that Mr. Spicer performed substantial services, the **Spicer** Court went on to analyze Mr. Spicer's status under the common law rules, implicitly suggesting that if Mr. Spicer were an independent contractor under such rules, he would not be considered a corporate employee, despite his role as a corporate officer performing substantial services. Such approach is entirely consistent with the dual capacity analysis which Ambucare seeks to have us apply."

In other words, the **Spicer** Court ruled that Mr. Spicer was a corporate employee because he had the label of a corporate officer, and that Mr. Spicer did not label himself as an "independent contractor," even though he had all the attributes of an independent contractor as an "officer" and sole shareholder of Spicer Accounting, Inc.. The **Idaho Ambucare** Court, on the other hand, presented the idea of a dual capacity status as a corporate officer as an employee and the same corporate officer as an independent contractor.

CONFLICT 5: THE NINTH CIRCUIT OPINION IN Spicer, supra, IS IN CONFLICT WITH THE NINTH CIRCUIT OPINION IN United States v. Aberdeen Aerie. No. 24 of Fraternal Order of Eagles, 148 F.2d 655 (9th Cir. 1945):

Almost 60 years ago, the Ninth Circuit rejected the "per se" corporate officer being an employee issue in **U.S. v. Aberdeen** which addressed the question as to whether the "president, vice president, treasurer and trustee were 'employees' within the meaning of Title VII of the Social Security Act." The **Aberdeen** Court rejected the argument that an officer is "per se" an employee of the corporation and applied the common law test to find that physicians of the fraternal lodge were officers but were also independent contractors as well, since no one could control their medical work. This was apparently the first case in the Ninth Circuit to recognize dual status in its opinion:

> "...[T]here is considerable discussion by both appellant and appellees with respect to whether Section 1101(a) of Title XI of the Social Security Act, 42 U.S.C.A. 1301(a)(6), applicable to both Titles VIII and IX of that Act, and Sections 1426(d) and 1607(i) of the Internal Revenue Code should be construed to mean that an officer of a corporation is an employee per se. While that question is not properly before this Court, for the District Court made no such finding, we are inclined to agree with the considered weight of authority that each officer must meet the accepted tests of employer-employee relationship to come within the scope of the Act." (148 F.2d at 658).

CONFLICT 6: THE FIRST CIRCUIT OPINIONS IN United States v. Griswold, 124 F.2d 599, 602 (1st Cir. 1941) **AND IN Deecy Products Co. v. Welch**, 124 F.2d 592 (1st Cir. 1941) **ARE IN CONFLICT WITH THE NINTH CIRCUIT OPINION IN Spicer**, supra, AND THE THIRD CIRCUIT IN THIS CASE:

In 1941, the First Circuit rejected the "per se" or ipso facto" argument of a corporate officer being an employee in **United States v. Griswold** which followed its prior case in **Deecy Products Co.**. The legislative history proves that the "officer" language was inserted into 26 U.S.C. 3121(d)(1) to make clear that supervisory persons could obtain social security. **Deecy**, 124 F.2d at 596, noted that the hearings before the Senate Committee on Finance in S.1130, 74 Cong. 1st Sess. 719 (1934) on the Economic Security Act, later to be the Social Security Act of 1935, discussed exceptions of "white collar" workers from the Act.

CONFLICT 7: THE FIFTH CIRCUIT OPINION IN Texas Carbonate Co. v. R.L. Phinney, 307 F.2d 289 (5th Cir. 1962) **IS IN CONFLICT WITH THE OPINIONS IN Spicer**, supra, **Joseph Radtke, S.C. v. United States**, 895 F.2d 1196 (7th Cir. 1990), **AND THE THIRD CIRCUIT OPINION IN THIS CASE:**

In the present case, petitioner relied on the analysis of the Fifth Circuit in **Texas Carbonate Co.** which reasoned that an officer of a corporation was not "per se" an employee of the corporation, but that the common law rules of the employer-employee relationship had to be applied in determining any employment status between an officer and a corporation. The Third Circuit rejected the Fifth Circuit's approach in **Texas Carbonate Co.** and relied solely on the Ninth Circuit in **Spicer** and the Seventh Circuit in **Radtke.**

CONFLICT 8: THE NINTH CIRCUIT OPINION IN Wells v. Clackamas Gastroenterology Associates, P.C., 271 F.3d 903 (9th Cir. 2001), **cert. granted**, No. 01-1435, 123 S.Ct. 31, 153 L.Ed. 2d 893 (Oct. 1, 2002) **IS IN CONFLICT WITH THE NINTH CIRCUIT OPINION**

IN Strother v. Southern California Permanente Medical Group, 79 F.3d 859, 865-68 (9th Cir. 1996) **AND THE SEVENTH CIRCUIT OPINION IN Zimmerman v. N. American Signal Co.,** 704 F.2d 347,351 (7th Cir. 1983):

The issue of labels or titles of reclassified workers versus economic reality as to whether an officer is an employee of the corporation was addressed by **Wells** which had to do with the determination of the employment status of corporate officers holding professional medical licenses. Although it deals with Antidiscrimination Act matters and not a tax case, it construes the definition of employee and will set precedent in tax cases in the same manner as **Nationwide Mutual Ins. Co. v. Darden,** 503 U.S. 318,323-24, 112 S.Ct. 1344, 117 L.Ed. 581 (1992) which was appealed from the Ninth Circuit; wherein the Ninth Circuit in **Nationwide** rejected the "economic realities test" to determine that stockholders were employees.

The dissent in **Wells** argued that under the "economic realities test," the shareholders were not partners, citing **Zimmerman** which held that the terms used to describe the relationship between corporate officers and the corporation are not dispositive of the nature of the relationship. The **Wells** dissent went on to state that the governing factor in determining who is or is not an employee is not determined by "labels" but rather by "realities." (See **EEOC v. Dowd & Dowd, Ltd.,** 736 F.2d 1177 (7th Cir. 1984); **Devine v. Stone, Leyton & Gershman, P.C.,** 100 F.3d 78,80-81 (8th Cir. 1996); **Fountain v. Metcalf, Zima & Co., P.A.,** 925 F.2d 1398, 1400-01 (11th Cir. 1991)). The **Wells** dissent also cited **Strother** and stated that "economic realities are more important than labels." (271 F.3d at 906).

II. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH WAS WRONGLY DECIDED BY THE THIRD CIRCUIT AND WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

In this case, the Third Circuit has interpreted 26 U.S.C. Sec. 3121(d)(1) narrowly, exclusively, and out of context in violation of 1 U.S.C. Sec. 1 which states: "In determining the meaning of any act of congress, unless the context indicates otherwise —..." When interpreting the meaning of a statute, it is the obligation of the courts to read a statute in light of its context and apply the generally accepted definition of the words and phrases unsed therein.

The context of Sec. 3121(d)(1) includes other parts of the employment tax statutes in the Internal Revenue Code (Title 26 U.S.C.) along with Section 530 of the Revenue Act of 1978, P.L. 95-600 as amended by P.L. 96-167, P.L. 96-541, P.L. 97-248, P.L. 97-248, P.L. 99-514, and P.L. 104-188 (Sect. 530). Part of the context of the employment tax statutes surrounding Sec. 3121(d)(1), the term employee is defined as a separate person from the employer who is also defined as the "person employing" him or her. The term "employment" in 26 U.S.C. Sec. 3121(b) "means any service, of whatever nature, performed (A) by an employee for the person employing him..." Therefore, an employer must be a different "person" than the "employee." In 26 U.S.C. Sec. 3121(a), "...the term "wages" means all remuneration for employment..." Therefore, where there is no employment between two separate persons, there are no wages due to any individual without the presence of another person who could or actually does employ him. Sec. 3121(c) continually refers to the "person employing him" as the "employer" for purposes of "included and excluded services."

Since it was ruled in **Simbraw v. United States**, 367 F.2d 373 (3d Cir. 1966), that a corporation is not a "person," then by ruling in the present case that John G. Yeagle was petitioner's employee, the Third Circuit is stating here, that the petitioner (S corporation) is the employer identified as "the person employing him" in all the employment tax statutes, and since we know from the context of 26 U.S.C.A. Sec. 3121(d)(1) that an employer must be a person, then the Third Circuit has contradicted itself in this case, pursuant to its **Simbraw** analysis of the nature of a corporation.

The Third Circuit also failed to recognize and apply the plain language definition of "employment status" as contained in Sect. 530(c)(2) (See App.: p. 34a), and nothing in Sec. 3121(d)(1) suspends this definition in determining whether an officer of a corporation is an employee of the corporation. Revenue Procedure 85-18, I.R.B. 1985-13, 27 (App.: p. 35a) allows Sect. 530 to apply to officers of corporations and does not exclude them from safe haven as not being treated as an employee for purposes of Sect. 530. Rev. Proc. 85-18 considers a "reasonable basis" for not treating an individual as an employee to not just being limited to the reasonable bases mentioned in Sect. 530(a), and "that "reasonable basis" should be construed liberally in favor of the taxpayer..."

Petitioner also asks this Court to consider the due process violation commited by Respondent by respondent's failure to comply with the provisions of Sect. 530(e) (App.: p. 26a) by never providing petitioner with the required written notice of the provisions of Sect. 530, and which petitioner asserts was intentional by respondent.

III. THIS CASE HAS BEEN DECIDED BY THE THIRD CIRCUIT IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

THE THIRD CIRCUIT OPINION IN THIS CASE IS IN CONFLICT WITH THE SUPREME COURT'S OPINION IN F.Drew Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917):

The Third Circuit in this case relied on a non-legislative interpretation of the Internal Revenue Service in its Treasury Regulation 31.3121(d)-1(b) which gives an exception to an officer being treated as an employee based on the amount of work the officer does and not on whether any Sect. 530(c)(2) "employment status" exists between an officer and a corporation. The Treas. Reg. 31.3121(d)-1(b) was published in 26 C.F.R. Sec. 31.3121(d)-1(b). (See App.: p. 5a). This Court ruled in **Caminetti** that "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributable to them..." (37 S.Ct. at 194) and further:

> "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning...when the words are free from doubt, they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by consideration drawn from titles or designating names...or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impractical consequences, it is the sole evidence of the ultimate legislative intent." (37 S.Ct. at 196).

THE THIRD CIRCUIT OPINION IN THIS CASE IS IN CONFLICT WITH THE SUPREME COURT'S OPINION IN Rowland v. California Men's Colony, Unit II Men's Advisory Counsel, 506 U.S. 194, 113 S.Ct. 716 (1993):

By declaring that Petitioner was the employer of Mr. Yeagle, the Third Circuit identified Petitioner as a "person," since only a person can be an employer of another person. Since **Rowland** ruled that a corporation is not a person, and that it is, instead, an "artificial entity" that cannot give authority to its officer or control its officer, then it cannot be an employer of its officer as well. This is true, because all the employment tax statutes define an employer as a person. (See Secs. 3121(a), 3121(b), 3121(c) and 3121(d) and Sect. 530).

THE THIRD CIRCUIT OPINION IN THIS CASE IS IN CONFLICT WITH THE SUPREME COURT'S OPINION IN David A. Gitlitz, et ux, et al v. Commissioner of Internal Revenue, 121 S.Ct. 701 (2001):

Gitlitz addressed the narrow, exclusive, and out of context reading of 26 U.S.C. Sec. 108(d)(7)(A) with reference to how cancellation of debt should be passed through from an S corporation to its shareholder:

> "The very purpose of a subchapter S is to tax at the shareholder level...[N]othing in Sect. 108(d)(7)(A) suspends the operation of these ordinary pass through rules...The Commissioner finds support for his literal exclusive reading of Sect. 108(d)(7)(A)'s language in the fact his reading would close a significant tax loophole."

Just as the pass through rules, contained in 26 U.S.C. Sec. 1366, of an S corp. to its

shareholder are not suspended by Sec. 108(d)(7)(A), according to **Gitlitz**, those same pass through rules, pertaining to the instructions as to the character of income passed through by an S corp. to its shareholder (Sec. 1366(b)), are not suspended by Sec. 3121(d)(1), just because the shareholder chooses to label himself an "officer" title. In other words, according to Sec. 1366(b), the character of income coming to the S corp. is the same as that passing through to its shareholder. If income earned by the S corp. was not characterized as "wages" from an employer to an employee, then that income passed through to the shareholder cannot be characterized as "wages" either.

In the instant case, the I.R.S. perceived that the treatment of Mr. Yeagle as not being an employee would be a tax loophole needing to be closed by declaring him an employee of petitioner, so that FICA and FUTA employment taxes could be assessed against petitioner. Self employment social security taxes are not assessable on the income passed through from an S corp. to its shareholder, pursuant to I.R.S. Revenue Ruling 1959-1 C.B. 225 which addressed the question as to whether an S corp. shareholder was really self employed and, as such, subject to the same rate of social security tax assessed against employers and employees.

IV. THE I.R.S. MISLEAD PETITIONER IN TWO WAYS:

1. The I.R.S. waited nine years after petitioner incorporated to reclassify Mr. Yeagle as an employee of petitioner. Petitioner was formed in 1989, and it was not until 1998 that I.R.S. told petitioner that its shareholder was an employee of petitioner; thereby assessing a greater liability against petitioner than the smaller liability for only 1989.

2. Petitioner asserts that I.R.S. did not comply with the requirement of Sect. 530(e) (App.: p. 26a) by never providing petitioner with the written notice of the provisions of Sect. 530, so that petitioner would not have had the benefit of access to the "safe havens" from I.R.S.'s determination that Mr. Yeagle was an employee of petitioner, since he was never an employee of petitioner under the definition of "employment status" contained in Sect. 530(c)(2) as applied to petitioner and Mr. Yeagle, the only living **"person"** in petitioner during the years at issue in this case.

CONCLUSION

THEREFORE, petitioner, YEAGLE DRYWALL COMPANY, INC., requests this Court that it GRANT ITS Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED,

Joseph H. O'Donnell, Jr.,
Counsel of Record

116 East Allen Street
Philadelphia, PA 19125
(215) 426-3245

Attorney for petitioner